

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	01-0705
Northern Illinois Gas Company Reconciliation	:	
of revenues collected under gas adjustment	:	
charges with actual costs prudently incurred.	:	
Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
Northern Illinois Gas Company	:	
d/b/a NICOR Gas Company	:	02-0067
Proceeding to review Rider 4, Gas cost,	:	
pursuant to Section 9-244(c) of the Public	:	
Utilities Act.	:	
Illinois Commerce Commission	:	(Cons.)
On Its Own Motion	:	
-vs-	:	
Northern Illinois Gas Company	:	
d/b/a Nicor Gas Company	:	02-0725
Reconciliation of revenues collected under	:	
gas adjustment charges with actual costs	:	
prudently incurred.	:	

PETITION FOR INTERLOCUTORY REVIEW OF THE RULING ON STAFF OBJECTIONS TO NICOR DATA REQUESTS

Now comes the Staff ("Staff") of the Illinois Commerce Commission ("Commission"), pursuant to Section 200.520 of the Commission's Rules Of Practice (83 Ill. Adm. Code 200.520), and in accordance with the schedule established by ruling of the Administrative Law Judges ("ALJs") in this proceeding made on February 11, 2004, and seeks Commission review of the ALJs' ruling on Staff Objections to Nicor Data Requests. On February 11, 2004 the ALJs confirmed their earlier ruling, which required Staff to respond to NG-ICC 1.01 – 1.58, and limited members of Staff required to

respond to the data requests to Staff within the Energy and Financial Analysis Divisions. In support of its Petition for Interlocutory Review, Staff states as follows:

I. Procedural History

1. Docket No. 02-0067 was initiated by the Illinois Commerce Commission (“Commission”) on January 24, 2002, pursuant to Section 9-244(c) of the Public Utilities Act (“Act”), to review Northern Illinois Gas Company’s (“Nicor”) performance based regulatory program (“PBR”). 220 ILCS 5/9-244(c). An evidentiary hearing was held on June 10, 2002, at the close of which the record was marked “Heard and Taken.”

2. On June 27, 2002 Citizens Utility Board (“CUB”) filed a Motion to Reopen the Record. As the basis for its Motion CUB stated that it had just received information that Nicor “withheld critical information and submitted misleading testimony” in the docket. (Motion to Reopen)

3. On July 9, 2002, the parties and Staff entered into a stipulation in which they agreed that additional discovery was necessary and to waive the 270 day time limit provided for in Section 9-244(c) of the Act. On July 16, 2002 the Commission entered an Interim Order accepting the stipulation and finding that additional discovery was necessary.

4. On December 10, 2002, the parties and Staff submitted a Joint Motion to Reopen the Record and Expand the Scope of the Proceeding. The Joint Motion stated that the information provided in the additional discovery warranted reopening Docket No. 02-0067 and expanding the scope of the proceeding to review related issues impacting the purchase gas adjustment clause reconciliation (“PGA”) dockets for the years 1999-2002. On December 17, 2002 the Commission entered a Second Interim

Order reopening Docket No. 02-0067 and finding it was the appropriate formal mechanism for addressing all issues related to the Nicor PBR program. The Second Interim Order also consolidated Docket Nos. 01-0705 and 02-0725, Nicor's two pending PGA dockets, with Docket No. 02-0067.

5. Nicor filed its direct testimony on August 5 and September 16, 2003.

6. On August 21, 2003, two months prior to the filing date for Staff's direct testimony on reopening, Nicor served its first series of data requests ("DRs") on Staff. Staff responded with an objection to being served with and being asked to respond to the DRs prior to the filing of Staff's direct case, which was set for November 21, 2003.

7. On October 20, 2003 Nicor filed a Motion to Compel seeking an order requiring Staff to respond to the DRs. The ALJs sustained Staff's objection and ordered Staff to serve any objections it may have to the subject matter of the first series of DRs on November 26, 2003 and to serve substantive responses to the DRs on December 5, 2003.

8. On November 26, 2002, Staff provided Nicor with the objection, which served as the basis for Nicor's Motion to Compel filed on December 24, 2003. The objection reads as follows:

General Objection to be applied to requests NG-ICC 1.01-1.58

In some instances, the scope to which Nicor intends its requests to apply is unclear. Staff objects to requests that seek: 1.) information from "all Staff employees and/or agents" and/or 2.) "all documents" (to the extent it seeks documents from all Staff employees of the Illinois Commerce Commission), as being overly broad, unduly burdensome and unlikely to lead to relevant information. Without waiving this objection Staff will respond to the data requests in the following manner; unless otherwise noted, "Staff" is defined as the Staff witnesses assigned to this docket, i.e., Mary Everson, Steve

Knepler, Mark Maple, and Richard Zuraski. In addition, Staff account Donald McGuire will be included in the definition of Staff. (See Staff Objections to Data Requests NG-ICC 1.01-1.58, November 26, 2003)

9. At the time Staff served Nicor with the foregoing objection, Staff was responding to Nicor's attempt to apply its data requests to a broad definition of Staff, which would encompass all employees of the Commission, with the limited exception of Administrative Law Judges. Staff argued that the scope of Nicor's DRs was over broad, unduly burdensome, and unlikely to lead to relevant material. This objection was based upon the breadth of the Commission Staff to whom Nicor addressed the DRs.

10. On December 5, 2003, Staff provided initial responses to the DRs from Staff witnesses assigned to this docket. This production consisted of workpapers, analyses and documents relied upon by Staff witnesses and was consistent with discovery normally provided by Staff in docketed matters. Nicor has not contested that Staff has provided this information.

11. On December 24, 2003, Nicor filed its Corrected Verified Renewed Motion to Compel Discovery from the Staff of the Illinois Commerce Commission ("Motion to Compel"). Staff filed its Response to Nicor's Motion on December 31, 2003. The Response again focused upon the breadth of Staff persons to whom the DRs were directed.

12. On January 6, 2004, the ALJs ruled that "...Staff's responses are limited to the energy- and finance-related personnel and are due January 9, 2004." Notice of Administrative Law Judges' Ruling, Jan. 6, 2004.

13. It was only when Staff set about the task of amassing the material responsive to the DRs from the Staff members included in the ALJs' ruling that Staff became aware of the full import of Nicor's DRs. At this time it became clear that Nicor had not limited its request to workpapers, analyses and information relied upon in drafting testimony. Nicor data requests NG-ICC 1.01 – 1.58 were not only directed at all Staff members (now limited to finance and energy personnel), but defined the documents requested as "...non-identical copies (e.g., copies with any additions, alterations, amendments, authorizations, attachments, changes, comments, deletions, editing marks, modifications, notes, or other differences), and drafts or other preparatory materials, regardless if used, circulated, or published, of all recorded or graphic matter whatsoever, whether in written or electronic form." (First Set of Data Requests to the Staff of the Illinois Commerce Commission, Instructions and Definitions, p. 2) Nicor further instructed that requests for information regarding or relating meant "...referring to, constituting, concerning, consisting of, embodying, evidencing, mentioning, describing, memorializing, stating, setting forth, discussing, analyzing, used in considering or evaluating, or having any logical or factual connection with." (Id., at 2-3)

14. The scope of Nicor's data requests is unprecedented, not only in regards to the Staff members to whom they were directed, but also in regards to the breadth of the material requested. These DRs represent a major departure from the way in which discovery has been conducted on the Staff.

15. Staff's position with respect to Nicor Data requests NG-ICC 1.01 – 1.58 is that the requests are, as applied to Staff, "unreasonably broad, unreasonably burdensome, and unlikely to lead to relevant material." (Staff's Response to Nicor's

Corrected Motion to Compel Discovery from the Staff of the Illinois Commerce Commission, filed December 31, 2003, p. 3). Notwithstanding Staff's objections to these data requests, Staff has complied in part.¹

16. As was pointed out in the Staff Objection and Motion for Additional Time to Respond the Data Requests, filed on January 9, 2004, the breadth of the materials requested is staggering, especially given the sheer number of actions required in order to comply. This pleading, like the Staff Objections to Nicor Data Requests filed on January 29, 2004, will outline Staff's objections, and will demonstrate that the requests are unduly burdensome and are not likely to lead to relevant information, and that even if the requests were more narrowly tailored to minimize the burden and to lead to relevant information, they should be deemed the subject of an evidentiary privilege. In offering this demonstration, Staff asks that the Commission recognize the unique role of the members of the Commission Staff who present expert testimony to the ALJs and members of this agency, both in practical terms and under the Rules of Practice the Commission has established. Staff also seeks to contrast its role with that of Nicor, a regulated entity.

¹ Staff counsel originally informed counsel for Nicor that it objected to the breadth of "Staff," except as the data requests applied to Staff witnesses and Don McGuire of the Financial Analysis Department, in a good faith gesture one could argue is not technically required but was appropriate given the nature of his involvement in the case. Also, Staff has forwarded some responses to data requests 1.01 through 1.58 that pertain to Commission employees other than Mr. McGuire and the Staff witnesses, as the result of a good faith effort to comply with DRs of unprecedented scope. We stand by the accuracy of our responses, but the grievousness of the burden, combined with the vigor with which Nicor is pressing these unconscionable requests, forced us to painstakingly review the Rules. This resulted in Staff renewing its earlier objections to any discovery concerning non-witnesses other than Mr. McGuire.

II. The Nature and Role of the Commission Staff in ICC Proceedings

17. In conferring upon the Illinois Commerce Commission all of the powers and duties set forth in the Public Utilities Act (220 ILCS 5, referred to below as “Act”), the General Assembly entrusted the agency with the following authority:

(a) In order that the Commission may perform the duties and exercise the powers granted to it and assume its responsibilities, under this Act and any and all other statutes of this State, the Commission, acting jointly, shall hire an executive director who shall be responsible to the Commission and shall serve subject only to removal by the Commission for good cause. The executive director shall be responsible for the supervision and direction of the Commission staff and for the necessary administrative activities of the Commission, subject only to Commission direction and approval. In furtherance thereof, the executive director may organize the Commission staff into such departments, bureaus, sections, or divisions as he may deem necessary or appropriate. In connection therewith, the executive director may delegate and assign to one or more staff member or members the supervision and direction of any such department, bureau, section or division.

(b) The executive director shall obtain, subject to the provisions of the Personnel Code, such accountants, engineers, experts, inspectors, clerks, and employees as may be necessary to carry out the provisions of this Act or to perform the duties and exercise the powers conferred by law upon the Commission. All accountants, engineers, experts, inspectors, clerks, and employees of the Commission shall receive the compensation fixed by the Executive Director, subject only to Commission approval. Notwithstanding these provisions, each commissioner shall have the authority to retain up to 2 full-time assistants, subject to the provisions of the Personnel Code, who shall be supervised by the commissioner and whose compensation shall be fixed by the commissioner.

220 ILCS 5/2-105 (subsections (a) and (b))

18. The Act expressly confers authority on Commission employees and officers, to examine any and all records of public utilities. Section 5-105 reads as follows:

The Commission may provide for the examination and audit of all accounts, and all items shall be allocated to the accounts in the manner prescribed by the Commission. *The officers and employees of the*

Commission shall have authority under the direction of the Commission to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utilities.

220 ILCS 5/5-105 (emphasis supplied)

19. In recognition that this authority would mean unfettered access to utility records, some of which might be argued to be sensitive or otherwise subject to some form of protection, the General Assembly put Commission officers and employees under a threat of criminal prosecution that no party to a Commission proceeding faces:

Any officer or employee of the Commission who divulges any fact or information coming to his knowledge during the course of an inspection, examination or investigation of any account, record, memorandum, book or paper of a public utility, except in so far as he may be authorized by the Commission or by a circuit court, shall be guilty of a Class A misdemeanor.

220 ILVCS 5/5-108

20. The courts also have recognized the special role the Commission's employees play in the discharge of the Commission's powers and duties:

The Act gives the Commission investigative powers. (Ill. Rev. Stat. 1987, ch. 111 2/3, par. 4-101.) The Commission, usually through its Staff, may gather evidence, subpoena witnesses, depose witnesses, or require the production of documents in order to determine whether a utility has complied with the Act. (Ill. Rev. Stat. 1987, ch. 111 2/3, par. 10-106.) *The Staff, or those employees of the Commission who engage in investigatory, prosecutorial, or advocacy functions, remain separate from the commissioners, hearing examiners and other members of the Commission who render decisions.* (Ill. Rev. Stat. 1987, ch. 111 2/3, par. 10-103.) *The Commission, therefore, has a special role in that it performs investigative, prosecutorial and advocacy, as well as decisionmaking, functions.*

Business and Professional People for the Public Interest v. Illinois Commerce Commission, 136 Ill. 2d 192, 555 N.E.2d 693, 144 Ill.Dec. 334 (1990; *BPI I*); 144 Ill.Dec. at 338 (emphasis supplied)

21. The Commission's Rules of Practice also recognize the unique role Commission employees play in Commission proceedings. For example, Staff witnesses are not parties in Commission proceedings:

"Party" means any person who initiates a Commission proceeding by filing an application, complaint or petition with the Commission, or who is named as a respondent, or who is allowed by the Commission or by statute to intervene in a proceeding. Such a party to a proceeding before the Commission may be an applicant, complainant, intervenor, petitioner or respondent. *Staff witnesses are not parties but shall have the specific rights and duties enumerated in this Part.*

"Staff witness" means a member of the Commission staff, excluding counsel, who testifies or enters an appearance in a particular proceeding before the Commission. Except for staff witnesses, this definition shall not limit the utilization of Commission staff as technical advisors to the Hearing Examiner or Commission.

83 Ill. Adm. Code 200.40, definitions of "Party" and "Staff witness" (emphasis supplied)

22. Under Section 200.345 of the Commission's Rules of Practice, "Formal discovery by staff witnesses shall be allowed upon motion to the Hearing Examiner or the Commission. If granted, said discovery is deemed to be on the Commission's own motion." 83 Ill. Adm. Code 200.345. Thus, Staff witnesses, unlike any party to a Commission proceeding, have the right to engage in formal discovery that is deemed to be on the Commission's own motion, if so permitted by the ALJs or the Commission.²

23. Furthermore, the section of the Commission's Rules of Practice addressing failure to comply with a discovery order or with a subpoena reads thus:

If a person fails to comply with a subpoena or a discovery order or refuses to attend or be sworn at a hearing or deposition, the Hearing Examiner may suspend further proceedings until compliance is obtained, or if the person who fails to comply is a party to the proceeding or an

² The Act and Commission rules refer to Administrative Law Judges as "hearing examiners." This Petition quotes such sources accurately, but otherwise refers to the Commission's ALJs as such.

officer, agent or employee of a party, the Hearing Examiner may strike all or any part of the pleadings of such party, or refuse to allow the party to support designated claims or defenses, or take such further action as may be appropriate under the circumstances and as provided by law.

83 Ill. Adm. Code 200.420

24. Staff witnesses are persons, but under Section 200.40, they are clearly not “parties.” Our reason for citing Section 200.420 is to emphasize the fact that Staff witnesses are unique among participants to Commission proceedings.³ They are employed by the Commission “as may be necessary to carry out the provisions of this Act or to perform the duties and exercise the powers conferred by law upon the Commission.” 220 ILCS 5/2-105. They are paid by the Comptroller of the State of Illinois, by warrant drawn on the State Treasurer, at salaries that are fixed by the Executive Director. The warrants are a matter of public record.

III. The Nature and Role of the Regulated Utility in ICC Proceedings

25. Nicor plays a vastly different role from that of the Staff in ICC proceedings. The Commerce Commission is vested with the duty of the supervision of public utilities.

The Commerce Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted....

220 ILCS 5/4-101

³ In its Staff Objections to Nicor Data Requests filed on January 29, 2004, Staff informed the ALJs and the parties that given the importance of these issues to the relationship between the Commission and its employees, Staff reserved the right to seek the ultimate ruling from the Commission, as it now does under 83 Ill. Adm. Code 200.520(a).

The principle behind utility regulation is the regulatory compact.⁴ “As part of that compact, utilities must comply with the requirements of the Act and subject themselves to certain constraints...” *Citizens Utility Bd. v. Illinois Commerce Commission*, 275 Ill. App. 3d 329, 344 (Ill. App. 1995). As a regulated public utility, Nicor is required to furnish to the Commission all information needed by the Commission. See 220 ILCS 5/5-101.

26. This proceeding is a Commission inquiry into actions taken by Nicor. Specifically the Commission initiated these proceedings to review Rider 4 gas cost and to reconcile revenues collected under gas adjustment charges with actual costs prudently incurred. Staff witnesses gather evidence and provide analyses in order to assist the Commission in rendering decisions in docketed matters. Staff members, other than testifying witnesses in a given docket, have no relevant information. This is reflected in Section 200.340 of the Rules of Practice, which expressly references the “...exchange by the parties *and staff witnesses* of all relevant and material facts to a proceeding...” 83 Ill. Adm. Code 220.340 (emphasis supplied). This provision adapts discovery procedures to the practical reality of practice before the Commission. As noted above, Section 200.345 also addresses formal discovery *by Staff witnesses*.

Thus, at the outset, there is no basis under the Rules of Practice for concluding that any

⁴ “The bedrock principle behind utility regulation is the so-called ‘regulatory compact,’ which arises out of a ‘bargain’ struck between the utilities and the state. As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer. At the same time, the utility is not permitted to charge rates at the level which its status as a monopolist could command in a free market. Rather, the utility is allowed to earn a “fair rate of return” on its ‘rate base.’ Thus, it becomes the Commission’s primary task at periodic rate proceedings to establish a level of rates and charges sufficient to permit the utility to meet its operating expenses plus a return on investment which will compensate its investors.” *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790 (Ind., 2000)

Commission employees other than Staff witnesses are subject to discovery requests. Staff, other than those Staff members who have provided testimony in this proceeding, should be absolved of any obligation to comply with DRs NCG 1.01 through 1.58 on this basis alone.

27. Nicor states that its data requests directed to Staff, “seek documents and information related to the Gas Cost Performance Program... and the Company’s annual ...PGA... proceedings ...” and “... mirror the subject matter of this proceeding on reopening.” (See Motion to Compel, p. 2.) Nicor correctly states that Staff has not disputed the relevance of the areas of inquiry addressed in the data requests. Staff objects that the data requests are unreasonably broad, unreasonably burdensome, and unlikely to lead to relevant material. These proceedings are an inquiry into actions taken by Nicor, not Staff. Nicor, by issuing data requests of the scope and breadth of NG-ICC 1.01 through 1.58 has attempted to turn the focus of this proceeding away from the activities of the Company and towards communications among and between Staff members, some of whom are witnesses in this proceeding and some of whom are not. The only information that Staff has that is ultimately relevant to the subject matter of this proceeding are the workpapers and analyses relied upon by Staff witnesses in their testimony.

28. Contrary to the implications in Nicor’s Motion to Compel, Staff’s position is not inconsistent with the policy that “[t]he purposes of litigation are best served when each party knows as much about the controversy as is reasonably practicable.” Mistler v. Mancini, 483 N.E.2d 1125, 1128 (1st Dist. 1983). As discussed above, Nicor has full access to the facts that form the basis of the proceedings. Staff has already provided

the Company with prefiled direct testimony and witness workpapers. That is the only information in Staff's possession that should be subject to discovery.

IV. Nicor Data Requests NCG 1.01 through 1.58 Will Not Lead to Relevant Information

29. As is the case with a public utility that is a petitioner or respondent in a Commission proceeding, and as with other parties appearing in Commission proceedings, the Commission's Staff witnesses are subject to reasonable discovery under the rules of the Commission and other applicable law. Any further attempt to equate Staff witnesses with a public utility corporation such as Nicor, or its employees and officers, for purposes of discovery in a proceeding such as this, must fail. The "Commission Staff" does not have a corporate existence separate from that of the agency itself, and information and writings in the possession of one or more Staff members who are not witnesses in the proceeding cannot, unless considered by Staff witnesses in ways that render them discoverable under State law (see the discussion of Supreme Court Rule 213(f) below), lead to information relevant to a Commission proceeding.

30. As the Illinois Supreme Court noted in *BPI I*:

any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in . . . the [Illinois Administrative Procedure Act].

BPI I, 144 Ill.Dec. 334, at 338-339 (quoting Ill Rev. Stat. 1987, ch. 111 2/3, par. 10-103, now 220 ILCS 5/10-103)

Any effort to argue that all information in the possession of Staff is somehow “chargeable” to the Commission in its decisionmaking role, or to Staff witnesses who otherwise have no knowledge of it, must fail. It is crucial that the relevance of information in the possession of employees other than Staff witnesses be judged in light of this fact.

31. Nicor has yet to explain what material prejudice it claims as a result of Staff’s limitation of data request responses to Staff witnesses. The argument appears to center around Staff’s criticism of Nicor for failing to provide relevant information in Docket No. 99-0127. (See Motion to Compel, p. 8, ¶ 12) Nicor states “...it is essential as a matter of law that the Company be able to test in discovery the validity of the opinions offered by Staff’s witnesses, including any basis for such opinions.” Id. Nicor appears to be arguing that it must be allowed to impose broad discovery upon Staff in order to determine if “Staff as a whole ... did not have access to or the chance to consider certain documents and/or information which the Company allegedly possessed...” (Id.) In this context, Nicor’s argument is nonsensical. Nicor has not testified or otherwise alleged that, in fact, it did provide Staff with access to the documents or information referenced above. Regardless, discovery upon Staff is not necessary in order for Nicor to determine what information it provided to Staff.

32. Nicor cites Montgomery v. Department of Registration and Education, 146 Ill.App.3d 222, 496 N.E.2d 1100 (1st Dist. 1986) for the proposition that a party to an administrative proceeding is required to disclose all evidence in its possession “which *might* be helpful to an accused.” (See Motion to Compel, p. 6 ¶9.) In Montgomery, the Department of Registration and Education (“Department”) argued that Plaintiff’s

discovery request, for copies of statements relative to the investigation against her and any information that would be helpful, were beyond the scope of discovery required by the departmental rule. The court noted the basic obligation to disclose exculpatory information. Montgomery, 225, 1103. The court stated that an administrative body possesses broad discretion in conducting its hearings, but that the discretion must be exercised judicially, not arbitrarily. Montgomery, 226, 1103. The court stated, referencing decisions in cases involving professional licenses, that an agency is required to disclose evidence in its possession “which *might* be helpful to an accused.” Id.

33. The facts in Montgomery are not analogous to the facts at hand. Nicor has not requested exculpatory information as such, or information which might be helpful to it in disproving Staff’s allegations (that “Staff as a whole ... did not have access to or the chance to consider certain documents and/or information which the Company allegedly possessed ...”). As discussed above, it is nonsensical on its face for Nicor to request that information, since Nicor certainly must have knowledge itself of what information it has provided to Staff.

34. Nonetheless, subject to Nicor’s acceptance of a sound and fair construction of the term “exculpatory information,” Staff does not dispute that it has a fundamental obligation to disclose exculpatory information. Staff would not object to responding to a data request that was limited to requesting exculpatory information or information which might be helpful to Nicor in disproving Staff’s allegations that “Staff as a whole ... did not have access to or the chance to consider certain documents and/or information which the Company allegedly possessed ...” as it relates to Nicor’s LIFO

strategy. To fully appreciate what Staff offers here, however, it is essential to distinguish Nicor's "LIFO strategy" from a commonly used accounting practice.

35. The parties in this docket have used the term "LIFO" when referencing two distinct activities. LIFO ("last-in, first-out") is a generally accepted method of costing inventory. As set forth in Staff's initial response to NG-ICC 1.29, several Staff witnesses were aware that NICOR utilized a LIFO accounting treatment for its gas inventory. LIFO, as used in reference to this accounting treatment, should be distinguished from what Staff has identified as Nicor's "LIFO Strategy", which refers to the Company's plan for "generating easy no-risk savings by tapping into low-cost LIFO layers of its storage inventory." (ICC Staff Ex. 1.0, pp.16-17.) It is Nicor's LIFO Strategy (and Staff's contention that the Company withheld key information about the same) that is a major point of Staff's argument. Staff's knowledge that Nicor Gas uses the LIFO costing method does not equate to Staff having advance knowledge of strategies utilized by Nicor to access the LIFO layers, or, more importantly, of Nicor's intention to use the LIFO layers to insulate it from meaningful risk, while asserting otherwise to the Commission. Nicor's suggestion that anyone's knowledge that it used LIFO accounting, in and of itself, is an issue here, is a red herring.

V. The LIFO/LIFO Strategy Distinction, Staff Renews Its Objection to the LIFO DRs⁵

36. Without in any way limiting any objection Staff may have to other individual requests, Staff once again objects to Nicor Data Requests NG-ICC 1.29

⁵ This argument appeared in the Staff Objection and Motion for Additional Time to Respond to Data Requests, filed on January 9, 2004, as well as in the Staff Objections to Nicor Data Requests filed on January 29, 2004.

through 1.37.⁶ Taken together, these data requests amount to a “what did you know and when did you know it” as to Nicor’s use of a last-in first-out (“LIFO”) method of accounting for gas in storage inventory. Even as modified by the 1/6/2004 Ruling, these requests would require every Staff member described in that ruling to recount the moment at which he or she became aware of that accounting methodology, and the basis for that knowledge.

37. Staff has consistently objected to these data requests on the basis that they are “overly broad, unduly burdensome and unlikely to lead to relevant information.”⁷ For purposes of its renewed objection, Staff has focused on the lack of any likelihood that these data requests will lead to any information relevant to the resolution of any of the issues in this docket.

38. Staff’s understanding of these consolidated proceedings is that they are essentially intended to resolve issues relating to the operation of the program Nicor implemented under tariffs filed in accordance with the Commission’s Order entered November 23, 1999, in Docket No. 99-0127, and issues relating to any refunds that may be owing to Nicor customers as a result of the operation of the Company’s Rider 6 in 1999, 2000, 2001, and 2002.⁸

39. Staff is unaware of any basis upon which the information sought in Nicor Data Requests NG-ICC 1.29 through 1.37 would be relevant to any material issue in these consolidated proceedings, or could lead to relevant and material information. The

⁶ These data requests are set forth in full in Exhibit A to Nicor’s Corrected Verified Renewed Motion to Compel Discovery from Staff of the Illinois Commerce Commission, which was filed on December 24, 2003.

⁷ Staff Objections to Nicor’s Data Requests NG-ICC 1.01 thru 1.58. These are set forth in full in Exhibit B to Nicor’s Corrected Verified Renewed Motion to Compel Discovery from Staff of the Illinois Commerce Commission, which was filed on December 24, 2003.

⁸ See the first ordering paragraph in the Commission’s Second Interim Order in Docket No. 02-0067, entered December 17, 2002.

record in Docket No. 99-0127 speaks for itself, and presumptively contains the totality of information the Illinois Commerce Commission considered in ruling on Nicor's request for relief under Section 9-244 of the Public Utilities Act. What any member of the Commission's energy or finance-related staff might have known in the months preceding that filing cannot change what the Company, Staff witnesses, and other parties presented to the Commission in that Docket and the information upon which the Commission based its decision in that Docket.

40. Whatever value the information sought by Nicor may have to the Company or its current or former officers and employees as to issues that exist or may exist in the future before another tribunal, Nicor has yet to demonstrate that such information is relevant to an issue pending before the Commission, or could lead to information relevant to an issue pending before the Commission. As such, Nicor Data Requests NG-ICC 1.29 through 1.37 should be determined to be irrelevant to this proceeding.

41. At the January 15, 2004 Status hearing, the ALJ's requested that Staff, in its filing of Objections on January 29, 2004, address a question regarding the objection made in its Objection and Motion for Additional Time to Respond to Data Request (filed January 9, 2004). Specifically, Staff was asked to clarify its objection regarding Nicor Data Request NG-ICC 1.37. Staff has previously stated that, taken together, Nicor Data Requests NG-ICC 1.29 through 1.37 amount to a "what did you know and when did you know it" as to Nicor's use of a last-in first-out ("LIFO") method of accounting for gas in storage inventory. Staff further argued that these data requests are overly broad, unduly burdensome and unlikely to lead to relevant information. These concerns are

applicable to NG-ICC 1.37 as well as NG-ICC 1.29-1.36. NG-ICC 1.37 is a broad request for the production of “all documents...that analyze, evaluate, discuss, otherwise evidence the performance of a study, computation, compilation, or calculation of the costs associated with layers of Nicor Gas’ LIFO accounts of gas in storage.”⁹ Given the distinction made between LIFO strategy and LIFO accounting treatment described above, the scope of Nicor’s request is simply unjustified. In this regard, NG-ICC 1.37 suffers from the same inherent flaws as requests NG-ICC 1.29 through 1.36.

VI. The Burden Outweighs the Potential for Discovery of Relevant Information

42. Even if it be assumed that information in the possession of non-testifying Staff could lead to relevant information and is thus discoverable, there is not sufficient probability of relevance to overcome unreasonable breadth and burden of the data requests

43. The information sought from “Staff” in Nicor Data Requests NCG 1.01 through 1.58 is, as demonstrated above, not discoverable from persons other than Staff witnesses to begin with. Nevertheless, even taking into account Staff’s construction of the ALJs’ January 6, 2004, ruling narrowing the scope of its request, Nicor seeks from some 60 Commission employees all documents, electronic or otherwise, that are “referring to, constituting, concerning, consisting of, embodying, evidencing, mentioning, describing, memorializing, stating, setting forth, discussing, analyzing, used in considering or evaluating, or having any logical or factual connection with”¹⁰ a host of

⁹ It should be noted that in its response to Nicor’s First Set of Data Requests, served on December 5, 2003, Staff witnesses did in fact identify documents that were provided to the Company as part of the Staff response to NC-ICC 1.37. Thus, the Company has already received information as it relates to testifying Staff witnesses and Mr. McGuire.

¹⁰ Nicor Gas Company, First Set of Data Requests to the Staff of the Illinois Commerce Commission, Exhibit A to Nicor’s Corrected Verified Renewed Motion to Compel Discovery from Staff of the Illinois Commerce Commission, filed December 24, 2003; pp. 2-3.

documents having some connection with historical accounting practices of Nicor, the operation of Nicor's purchased gas adjustment clause, Nicor's annual reports, or specified segments of the report prepared by Scott Lassar of Sidley, Austin, Brown & Wood, LLP, on or about October 28, 2002.

44. The Data Requests seek all such documents falling into these categories without regard to whether such documents were ever relied upon, or for that matter, even considered by, Staff witnesses. For this reason, they betray a fundamental misunderstanding of the nature of the Commission Staff, as outlined above, and seek information that is irrelevant to the merits of this case, and highly unlikely to lead to relevant information.

45. The general Commission policy on discovery is as follows:

It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding. Further, it is the policy of the Commission to encourage voluntary exchange by the parties and staff witnesses of all relevant and material facts to a proceeding through the use of requests for documents and information. Formal discovery by means such as depositions and subpoenas is discouraged unless less formal procedures have proved to be unsuccessful. *It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding.*

83 Ill. Adm. Code 200.340 (emphasis supplied)

46. In addition, Section 200.370(b) of the Commission's Rules of Practice reads thus:

The Hearing Examiner may at any time on his or her own initiative, or on motion of any party or Staff, issue such rulings as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable annoyance, expense, disadvantage or oppression.

83 Ill. Adm. Code 200.370(b) (emphasis supplied)

47. Taken together, and read in conjunction with the instructions that accompanied them, Nicor Data Requests addressed to all Staff harass the employees of the Commission. This is true even if one takes into account the ALJs' ruling in this matter on January 6, 2004, that limited application of the DRs to Finance and Energy personnel. Holding aside the issue of exculpatory information addressed above, and comparing the nonexistent (or remote, if one assumes there is any chance that Nicor could demonstrate some heretofore unargued basis for relevance of information in the possession of non-witnesses) possibility that the requested documents could lead to relevant information, to the significant burden they impose on Commission employees other than the Staff witnesses in this case, it is clear that these Data Requests have the primary effect of harassing Staff, and are unreasonably annoying and oppressive. Nicor's efforts to seek orders compelling the Staff to search vast categories of records, produce the materials so that counsel may assess them and litigate which of them may be privileged or otherwise not subject to discovery, and turn them over to Nicor, should simply fail.

VI. Intragovernmental Communications Privilege

48. The Commission should recognize a privilege protecting intragovernmental communications among the employees of the Commission.

49. This argument pertains to all documents responsive to Nicor Data Requests NCG 1.01 through 1.58, as addressed to Staff witnesses testifying in this proceeding, to the extent it pertains to documents that have not as yet been disclosed to Nicor. It also pertains to all documents sought from other employees of the

Commission, to the extent it is determined that such documents are discoverable under the Commission's Rules of Practice notwithstanding the arguments contained in previous paragraphs of this Petition for Interlocutory Review.

50. The Commission's Rules of Practice address the applicability of Illinois Supreme Court rules concerning discovery as follows:

- a) *The Commission, any Commissioner, the Hearing Examiner or any party may, in any investigation or hearing before the Commission, cause the deposition of witnesses residing within or without Illinois to be taken in the manner prescribed by law for like depositions in civil actions in the courts of Illinois and to that end may compel the attendance of witnesses and the production of papers, books, accounts and documents.* [220 ILCS 5/10-106] Except under special circumstances and for good cause shown, no deposition may be taken except upon 14 days prior notice to all parties and staff witnesses.
- b) Payment of witness and mileage fees shall be as provided by Section 10-106 of the Public Utilities Act. [220 ILCS 5/10-106].
- c) In addition to depositions, and subject to the provisions of this Part, any party may utilize written interrogatories to other parties, requests for discovery or inspection of documents or property and other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].

83 Ill. Adm. Code 200.360 (emphasis, in original, denotes statutory language)

51. The Rules of the Illinois Supreme Court provide for the discovery upon expert witnesses as follows:

Upon written interrogatory, a party must furnish the identities and ~~location~~ addresses of witnesses who will testify at trial, ~~together with the subject of their testimony.~~ and must provide the following information:

(1) Lay Witnesses. A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives

reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(2) *Independent Expert Witnesses.* An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) *Controlled Expert Witnesses.* A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

Illinois Supreme Court Rule 213(f) (distinguishing type in original, reflecting rule as amended March 28, 2002, effective July 1, 2002)

52. It will be seen from the foregoing that the rules of the Illinois Supreme Court do not directly address a situation in which a regulatory agency employs a full-time staff from whose ranks experts are assigned to provide testimony in formal administrative proceedings. It would appear from the tenor of the rule, however, that Staff witnesses in Commission proceedings fit most closely into the category of "Controlled Expert Witnesses." Read thus, the rule would require Staff witnesses in Commission proceedings to provide "(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case."¹¹ Thus, unless a Staff witness bases his or her conclusions or opinions on

¹¹ By contrast, the Federal Rules of Civil Procedure require the following discovery of an expert witness: "Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness

comments or other materials, it would appear they would not be discoverable under Supreme Court rules irrespective of whether they originated inside or outside the agency.

53. Nicor is already in possession of the prepared testimony of the Staff witnesses in these proceedings, as well as other materials, such as workpapers, showing the calculations and other such background information from which the testimony was derived. Information sought of these witnesses in Nicor Data Requests NGC 1.01 through 1.58 includes “originals, non-identical copies (e.g., copies with any additions, alterations, amendments, authorizations, attachments, changes, comments, deletions, editing marks, modifications, notes, or other differences), and drafts or other preparatory materials, regardless if used, circulated, or published, of all recorded or graphic matter whatsoever, whether in written or electronic form.” This would include the witnesses’ communications with colleagues and supervisors both seeking and receiving advice and guidance concerning the developing Staff witness testimony, apparently including drafts of testimony.

54. The information sought is, to the knowledge of Staff counsel, unprecedentedly broad, being significantly more inclusive than what has been sought of

who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” F.R.C.P., Rule 26(a)(2)(B). These requirements were in existence for a number of years before the recent amendments to Illinois Supreme Court Rule 213, and the Supreme Court did not adopt them. Staff recognizes that the ALJs ruled (May 12, 2003, Tr., at 216) that Supreme Court Rule 213 does not apply to this proceeding, and is not seeking interlocutory review of that particular ruling. Staff includes this information about the current state of Illinois court rules, and the dramatic contrast between State and federal law on this point, as demonstrating the radical departure from current State and ICC norms being sought by Nicor.

or provided by Staff witnesses in any Commission proceeding. Under Illinois Supreme Court Rule 201(b)(2), "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." Given the unprecedented scope of the request at issue here, Staff argues for the recognition of a governmental deliberative process privilege that would protect communications internal to the agency that relate to the development of testimony by Staff witnesses.

55. Such a privilege has long been recognized in the federal courts. Its basis is summarized thus by the Supreme Court of Pennsylvania in *Commonwealth of Pennsylvania v. Vartan*:

The privilege recognizes that if governmental agencies were "forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." *Redland Soccer Club Inc.*, 55 F.3d at 854, citing *First [***14] Eastern Corp. v. Mainwaring*, 305 U.S. App. D.C. 371, 21 F.3d 465, 468 (D.C. Cir. 1994).

557 Pa. 390; 733 A.2d 1258 (1999)

56. Illinois jurists have also had occasion to weigh in on the need for a deliberative process privilege:

The need to recognize a deliberative process privilege is readily apparent. The realities of governmental decisionmaking create a need for preserving the confidentiality of intragovernmental documents reflecting the mental processes of decisionmakers. Good government requires sound decisionmaking. Sound decisionmaking depends on research, planning, and the consideration of the full array of contrasting views on a particular subject. Those responsible for providing assessments or detailing the potential pitfalls of policy options necessarily depend on an expectation of confidentiality, if their advice is to be candid and uninhibited.

People ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521; 705 N.E.2d 48; 1998 Ill. LEXIS 1916; 235 Ill. Dec. 435 (1998); Bilandic, J. dissenting, 235 Ill.Dec. at 442.

57. Justice Bilandic's persuasive dissent in *People ex rel. Birkett v. City of Chicago* came about as the result of a majority opinion declining to recognize such a privilege in the context of documents related to plans, discussions, or forecasts concerning future projects, as yet unapproved, for O'Hare International Airport. Even though it did not recognize the privilege sought by the defendants in that case, the Court did recognize authoritative Illinois precedent for the proposition that a court may recognize an evidentiary privilege where four conditions are met:

(1) the communications originated in a *confidence* that they will not be disclosed; (2) this element of *confidentiality is essential* to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) the *injury* that would inure to the relation by disclosure would be *greater than the benefit* thereby gained for the correct disposal of litigation.

235 Ill.Dec. at 440; emphasis in original; citations omitted.

58. Applying these standards to the communications at issue in this proceeding, it is apparent that such a privilege should be recognized for internal communications among the Staff of the Commission. First, such communications originate in confidence, not only because of the decades-old understanding of the working relationship that exists among the professionals at the Commission, but also because so much of the material under consideration by Commission Staff at any point in time is itself confidential.

59. The second standard is that “this element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties.” The public utilities Staff of the Commission participates in hundreds of formal administrative proceedings before the Commission each year. In order for Staff members to be able to provide the best advice and factual bases for Commission orders, it is crucial that testifying Staff receive the type of frank, unfettered peer review, supervision, and guidance that they have come to expect as part of the process of being an expert witness before the Commission.

60. The third standard for evidentiary privilege is that “the relation must be one which in the opinion of the community ought to be sedulously fostered.” While the community at large may not be aware of the relationship between Staff witnesses and those with whom they communicate in the course of preparing their testimony, the Pennsylvania Supreme Court observed that

The deliberative process privilege benefits the public, and not the officials who assert the privilege. *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914, 924 (Md. 1980) citing, *Kaiser Aluminum and Chemical Corp. v. United States*, 141 Ct. Cl. 38, 157 F. Supp. 939, 944 (Ct. of Claims 1958).

Commonwealth of Pennsylvania v. Vartan, 557 Pa., at 400

61. From Staff’s perspective, the members of the regulatory community that must assess the value of the Staff communications at issue here are those who render decisions under the Act. Staff’s firm belief is that if all internal communications that lead to the preparation of testimony are to be divulged to all parties in a case, Staff will be rendered incapable of performing its responsibility to the Commission. As things currently exist, Staff witnesses are educated and informed by an ongoing internal dialogue; the Commission, and thus the general public benefits greatly from the depth of

knowledge Staff witnesses can therefore share in testimony and bring to the hearing room. To require disclosure of all of the assistance staff members receive as they lay the groundwork for their testimony would be, in effect, to preclude such communications, to the detriment of the Staff, the Commission, and the people of the State.

62. The fourth standard for evidentiary privilege is that “the injury that would inure to the relation by disclosure would be greater than the benefit thereby gained for the correct disposal of litigation.” The testimony of Staff witnesses contains facts that the witness offers to the Commission, upon which the Commission should rely in weighing its decisions, and may, but is under no obligation to, rely in taking the recommended action. Staff witnesses are precluded from communicating with the Commission, and for that matter all Commission personnel involved in the decisional process, other than with notice to all parties and an opportunity for them to participate. 220 ILCS 5/10-103. Staff witness testimony is subject to cross-examination. The argument implicit in Nicor’s Corrected Verified Renewed Motion that counsel cannot effectively cross-examine without access to all hitherto undisclosed internal communications is inconsistent with decades of practice at the Commission, and rings exceedingly hollow.

63. Staff’s urging for the creation of an intergovernmental deliberative process privilege for Staff communications is so strenuous because of the nature of how such a determination would be made. Because it is in the employ of the Commission and will ultimately do what the Commission orders, Staff will never be in a position to argue to a court for the creation of a privilege. If the Commission recognizes such a privilege,

however, any party aggrieved by that decision need only follow the steps embodied in Article X of the Act to seek judicial review of that action.

64. The arguments that support a privilege for communications in which Staff witnesses participate also apply to communications that do not reach a Staff witness, which are, as noted above, within the scope of the data requests to which Staff objects. Thus, to the degree the arguments as to why such Staff members are simply not subject to such discovery are unavailing, Staff requests that the privilege apply to these communications as well.

WHEREFORE, Staff counsel respectfully requests that the Commission determine:

(1) that only Staff witnesses are required to respond to Nicor Data Requests NCG 1.01 through 1.58;

(2) that such Staff witnesses are only required to provide workpapers, analyses and documents relied upon by Staff witnesses, which has already been provided in accordance with what Staff counsel believes to be the practice typical in contested cases before the Commission;¹²

(3) if the Commission finds that any additional information would be subject to disclosure by these Staff witnesses under the rules of discovery otherwise applicable in Commission proceedings, Staff requests a determination that all responsive information

¹² The Staff Objection filed on January 29, 2004, the ALJs' ruling on which is the subject of this Petition for Interlocutory Review, sought a ruling that Staff witnesses need only provide the information set forth in Supreme Court Rule 213(f)(3), applicable to controlled expert witnesses. In light of the ALJs' earlier ruling that Supreme Court Rule 213 is not applicable to this proceeding, Staff essentially seeks from the Commission a determination consonant with general discovery of Staff witnesses as practiced before the Commission.

consisting of internal communications between and among employees of the Commission is the subject of a deliberative process privilege; and

(4) if the Commission determines that any information must be disclosed by Commission employees other than Staff witnesses (and Commission employee McGuire, as explained above), Staff requests a determination that all responsive information consisting of internal communications between and among *these* employees of the Commission (and otherwise subject to disclosure) is the subject of a deliberative process privilege.

February 20, 2004

Respectfully submitted,



JOHN J. REICHART
JANIS E. VON QUALEN
Staff Attorneys

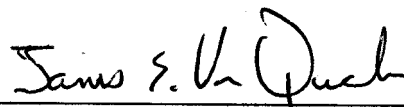
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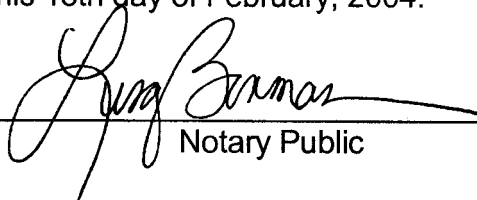
VERIFICATION

Janis E. Von Qualen, being first duly sworn, depose and state that I am an attorney in the Office of General Counsel of the Illinois Commerce Commission; that I have read the Response of the Staff of the Illinois Commerce Commission to the Verified Motion for Ruling on the Use of Deposition Transcripts in Pre-Filed Testimony and know the contents thereof; and that the statements contained in the Staff Objections to Nicor Data Requests are true, correct to the best of my knowledge, information and belief.



Janis E. Von Qualen
Staff Counsel
Illinois Commerce Commission

Subscribed and sworn to before me
this 18th day of February, 2004.


Notary Public